

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : Cr. No. 98-240-01 (AET)
 :
 v. :
 : JURY CHARGE
 DAVID H. MEAD, :
 Defendant :

THOMPSON, Chief Judge

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Ladies and gentlemen of the jury, this criminal case in which you have heard and seen all of the evidence and heard the closing arguments of counsel now approaches its final phase in which you will be required to enter upon your deliberations and to return your verdict.

Before you retire, however, it is my duty to explain to you certain principles of law which shall guide you in fulfilling your obligations as jurors.

* * *

FOREIGN CORRUPT PRACTICES ACT - GENERAL

The defendant here is charged both, in Count One, with conspiring to violate the Foreign Corrupt Practices Act, known as the FCPA, and, in Counts Two and Three, committing and aiding and abetting two substantive violations of that Act. The FCPA provides:

It shall be unlawful for any domestic concern . . . or for any officer, director, employee, or agent of such domestic concern, or for any stockholder thereof acting on behalf of such domestic concern,

- to make use of the mails or any means or instrumentality of interstate commerce
- corruptly and wilfully
- in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money or of anything of value
- to any foreign official or to any other person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official
- for purposes of
- influencing any or decision of such foreign official in his official capacity,

or

- inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or

- inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality
- to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

FOREIGN CORRUPT PRACTICES ACT (FCPA)- ESSENTIAL ELEMENTS

To sustain its burden of proof for the offense of violating the Foreign Corrupt Practices Act, as charged in Counts Two and Three of the Indictment, the government must prove the following essential elements beyond a reasonable doubt:

One: That the defendant is a domestic concern, a concept that I will define for you shortly, or a director, officer, director, employee, or agent thereof, or a stockholder acting on a domestic concern's behalf;

Two: That the defendant acted corruptly and willfully, another concept that I will shortly explain;

Three: That the defendant made use of the mails or any means of instrumentality of interstate commerce in furtherance of an unlawful act under this statute;

Four: That the defendant offered, paid, promised to pay, or authorized the payment of any money or of anything of value;

Five: That the payment or gift was to a foreign public official or to any person, while knowing that all or a portion of the payment or gift would be offered, given, or promised, directly or indirectly, to a foreign public official;

Six: That the payment was for one of three purposes:

- to influence any act or decision of the foreign public official;
- to induce the foreign public official to do or omit to do any act in violation of that official's lawful duty; or
- to induce that foreign public official to use his or her influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality; and

Seven: That the payment was made to assist the domestic concern in obtaining or retaining business for or with, or directing business to, any person.

FCPA- FIRST ELEMENT - “DOMESTIC CONCERN”

For purposes of the Foreign Corrupt Practices Act, a “domestic concern” is--

- any individual who is a citizen, national, or resident of the United States;

and

- any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

In this case, the indictment charges that the defendant, David H. Mead, was a domestic concern because he is alleged to have been a resident of the United States and an officer of the following entities which are further alleged to be domestic concerns:

- Saybolt, Inc., which is alleged to be a business incorporated under the laws of the State of Delaware, with its principal place of business in Parsippany, New Jersey;

- Saybolt North America Inc., which is alleged to be a business incorporated under the laws of the State of Delaware, with its principal place of business in Parsippany, New Jersey; and

- Saybolt Western Hemisphere, which is alleged to be an unincorporated association comprised of various affiliated Saybolt corporations and entities, with its principal place of business in Parsippany, New Jersey.

In addition, the indictment alleges that Frerik Pluimers was an officer and director of Saybolt Inc. and Saybolt North America Inc. and that Stephen Dunlop, identified as “Employee A” in the indictment, was a domestic concern because he was an American citizen, as well as an employee of Saybolt, Inc.

FCPA - SECOND ELEMENT - “CORRUPTLY AND WILLFULLY”

An act is ‘corruptly’ done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means. The term “corruptly” is intended to connote that the offer, payment, and promise was intended to induce the recipient to misuse his official position.

A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law and rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.

The government bears the burden of proving that the defendant acted corruptly and willfully. The defendant argues that the government has failed to meet its burden and that the evidence shows that, instead, he acted in a good faith belief that the payment to the Panamanian officials was lawful. You must consider the evidence, together with any other evidence in this matter, in determining whether the defendant had the requisite criminal intent or whether he acted in good faith.

FCPA - WILLFUL BLINDNESS

The element of knowledge may be satisfied by inferences you may draw if you find that the defendant deliberately closed his eyes to what otherwise would have been obvious to him. When knowledge of the existence of a particular fact is an element of the offense, such knowledge may be established if a person is aware of a high probability of its existence and then fails to take action to determine whether it is true or not.

If the evidence shows you that the defendant actually believed that the transaction was legal, he cannot be convicted. Nor can he be convicted for being stupid or negligent or mistaken; more is required than that. But a defendant’s knowledge of a fact may be inferred from *wilful blindness* to

the knowledge or information indicating that there was a high probability that there was something forbidden or illegal about the contemplated transaction and payment. It is the jury's function to determine whether or not the defendant deliberately closed his eyes to the inferences and the conclusions to be drawn from the evidence here.

FCPA - THIRD ELEMENT - "INTERSTATE COMMERCE"

For purposes of the Foreign Corrupt Practices Act, "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of (a) a telephone or other interstate means of communication or (b) any other interstate instrumentality. If they are used by persons and goods passing between the various States, they are instrumentalities of interstate commerce.

As a matter of law, the transmission of an email across state lines or to another country and travel aboard an airplane across state lines or to another country constitutes the use of a means or instrumentality of interstate commerce. So if you find that those things occurred, you may find that this element has been proved.

FCPA - FOURTH ELEMENT - AUTHORIZATION TO PAY IS SUFFICIENT

As I previously told you, one of the elements that the government must prove beyond a reasonable doubt before you can convict the defendant under Counts Two and Three of violating the FCPA is that the defendant offered, paid, promised to pay, or authorized the payment of any money or of anything of value.

It is not required that the actual payment be made by a domestic concern. It is the *authorization* by a domestic concern that is prohibited by the FCPA. Indeed, a domestic concern that

engages in bribery of a foreign official indirectly through any other person or entity is liable under the FCPA. Thus, if you find that a domestic concern or an officer, director, employee, or shareholder thereof, authorized another domestic concern, such as an American citizen, or a foreign agent, such as a foreign corporation, foreign subsidiary, or a foreign parent corporation, to make a payment on its behalf, that authorization alone is sufficient for you to find that this element has been proven.

Further, it is not necessary that the payment actually take place. Instead, it is the *offer* or the *authorization* that completes the crime. Thus, you may find the defendant guilty if you find that he authorized an unlawful payment, even if you believe that the payment was not actually made — that it was diverted by middlemen or even that the middlemen never even intended to pay the bribe. It is sufficient simply if the defendant believed that a bribe would be paid and that he authorized the bribe to be paid.

FCPA - PAYMENTS TO THIRD PARTIES - “KNOWING” - DEFINED

As I just told you, provided all the other elements are present, an offer, payment, or promise is unlawful under the Foreign Corrupt Practices Act if it is made to “any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official.” For the purposes of this section, a person’s state of mind is “knowing” if the person has actual knowledge, or a firm belief, that the money will be offered or given to any foreign official.

FCPA - FIFTH ELEMENT - “FOREIGN OFFICIAL”

For purposes of the Foreign Corrupt Practices Act, the term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof,

or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.

FCPA - SIXTH ELEMENT- “OBTAINING OR RETAINING BUSINESS”

The Foreign Corrupt Practices Act prohibits offers, payments, promises or gifts made by a domestic concern to obtain or retain business for *any* person. It is therefore not necessary for the government to prove that the domestic concern itself obtained or retained any business whatsoever as a result of an unlawful offer, payment, promise or gift.

Moreover, the Act’s prohibition of “corrupt payments for ‘retaining business’ is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment.”

FCPA - SOLICITATION OF BRIBE NOT A DEFENSE

For purposes of the Foreign Practices Act, it does not matter who suggested that a corrupt offer, payment, promise or gift be made. The Act prohibits any payment or gift intended to influence the recipient, regardless of who first suggested it. It is not a defense that the payment was demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract or other benefit. That the offer, payment, promise or gift may have been first suggested by the recipient is not deemed an excuse for a U.S. domestic concern’s decision to make a corrupt payment nor does it alter the corrupt purpose with which the offer, payment, or promise was made.